

AGREEMENT BETWEEN
CITY OF WILMINGTON
AND
NEW CASTLE COUNTY

CONCERNING
WILMINGTON SEWAGE TREATMENT SYSTEM

THIS AGREEMENT, made this 15TH day of June, 1998, by and between THE CITY OF WILMINGTON, a municipal corporation of the State of Delaware, party of the first part (hereinafter "City"), and NEW CASTLE COUNTY, a political subdivision of the State of Delaware, party of the second part (hereinafter "County").

WHEREAS, the City has owned, operated, and maintained a major sewage treatment system, including a sewage treatment plant (hereinafter "Plant"), and for some time has received and treated sanitary and industrial wastes from the adjacent areas of New Castle County; and

WHEREAS, the City and the County have from time to time entered into agreements pertaining to the management and expansion of this system by the City and the payment by the County for services received therefrom; and

WHEREAS, the last dated written agreement between the City and the County pertaining to this system was made July 1, 1992; and

WHEREAS, the City and the County desire to resolve certain indirect cost claims which arose in connection with said agreement; and

WHEREAS, the City presently intends to privatize the operation of the Plant; and

WHEREAS, the City and the County continue to recognize the need for close cooperation in treatment of regional sewage to avoid duplication of costly facilities and to thus reduce the overall cost of service and therefore the parties desire that the City continue to treat the County's sewage subject to Plant capacity described herein; and

WHEREAS, in recognition of the aforesaid, the City and the County are in the belief that a new agreement is required.

NOW, THEREFORE, the City and County, in consideration of the mutual promises and covenants set forth herein, agree that the usage by the County of the Wilmington sewage treatment system shall be governed by and in accordance with the terms and conditions herein set forth.

ARTICLE I

STANDARDS AND REGULATIONS

1. The City owns and, as of the date of this Agreement, operates, maintains and administers the Plant and collection and

transmission network (hereinafter "Network").

2. The City agrees to receive in the Network the sanitary sewage and industrial wastes discharged from the County intercepting sewers at several locations near the City limits, and to thereafter treat this sewage and these wastes at the Plant subject to the terms and conditions stated herein.

3. (a) The Plant, as it currently exists, has been designed to treat an annual average flow of one hundred five million gallons per day (105 mgd). The County's allocation of such flow shall be seventy (70) mgd. The County's allocation is predicated on the continuation of the County's agreements with other jurisdictions such as Newark, Delaware, Delaware County, Pennsylvania, and others as they presently exist to receive, transmit, and treat (or cause to be treated by the City) sanitary sewage and/or industrial waste, provided, however, that during the term of this Agreement, the City shall not seek to reduce the County's allocation, even if the County's agreements with such other jurisdictions are discontinued.

(b) The County agrees that it shall not, under any circumstances, exceed its allocation as stated above. In the event that the County does exceed its allocation, however, the County shall pay the City a "fee adjustment" in the amount of Two Hundred Fifty Thousand Dollars (\$250,000.00) per mgd on an annual basis.

This fee adjustment shall be prorated in direct proportion to the volume of sewage by which the County has exceeded its allocation on an annual average flow basis.

(c) The County shall, upon the City's request, provide the City with up-to-date documentation of the County's projected capacity requirements (flow and waste loadings) within a reasonable time after receipt of such requests.

4. The County agrees to cooperate and assist the City in investigating accidental spills or discharges of toxic pollutants generated by industries located in the County.

5. The County agrees to review with the City any new or proposed discharges from any industry in the County serviced by the Plant. Any discharges from industries in the County in excess of the current Industrial Waste Discharge Ordinance of the City must be approved in advance by the City.

6. The County shall accept all responsibility for any and all damage to the Plant and/or its processes arising from or contributed to by spills or discharges of toxic pollutants generated by industries serviced by the County outside the City limits or from discharges from any industry serviced by the County outside the City limits in excess of the then-current Industrial Waste Discharge Ordinance of the City.

7. The County agrees to formulate and enforce necessary rules and regulations and to do whatever else, including chlorination, as may be necessary so that the quality of the sanitary sewage and industrial waste discharge into the City's intercepting sewers and the Plant will meet any and all standards which the City may reasonably determine for sewage and industrial wastes.

8. Both parties agree to properly maintain all sewers presently under their respective jurisdictions or in their control.

9. The City agrees to review with the County permissible standards for discharge of toxic pollutants and the County agrees to cooperate with the City toward implementation and enforcement of rules and regulations established by federal, state and municipal regulatory authorities governing the discharge of industrial waste or toxic pollutants into the City's system.

10. The County shall periodically, but not less than quarterly, provide the City with technological data, including strength and flow data, with respect to the County system.

11. The County agrees to review with the City any proposed increases in its pumping capacity to the Plant.

12. The County recognizes that long detention times for sewage in the County collection and transmission systems can generate adverse levels of hydrogen sulfides in the system. This

results in corrosion and odor problems which can threaten employee health and safety and cause damage to equipment and structures. The County agrees to continued mitigation of the problem in cooperation with the City.

13. The County shall not receive sanitary sewage, industrial waste, or other matter in its sewer system from any jurisdiction outside of the County north of the Chesapeake and Delaware Canal, other than those jurisdictions currently served, without the express written consent of the City.

ARTICLE II

BASIS OF CHARGE

1. Settlement of Indirect Cost and Related Claims.

The parties agree to settle all indirect cost and related claims to date as follows:

(a) FY 1997. The County shall pay to the City the sum of Four Hundred Forty-Seven Thousand Six Hundred Ninety-Nine Dollars (\$447,699.00), without interest, subject to reconciliation upon receipt of actual costs and engineering data. Indirect costs in the reconciled bill shall be calculated as the average of the City's method and the County's method specified in the County's Mediation Statement, Exhibit F, a copy of which is attached hereto

as Exhibit A, which represents a 50-50 split of disputed indirect costs for Fiscal Year 1997.

(b) The parties acknowledge that all Fiscal Year 1996 indirect cost obligations have been completely discharged through the City's issuance of the agreed-upon credits to the County and the County's payment to the City in the amount of Nine Hundred Ninety-Six Thousand Seven Hundred Twenty-Two Dollars and Thirty-Five Cents (\$996,722.35), in accordance with the County's letters to the City dated November 1, 1997, copies of which are attached hereto as Exhibit B.

2. Waiver of Claims.

The parties agree to waive all indirect cost and related claims arising to date which were actually made or which could have been made against each other, including but not limited to those set forth in the arbitration action captioned "In the Matter of the Arbitration (Mediation) between City of Wilmington and New Castle County," Case No. 14 M 199 00014 97 H/J, filed with the American Arbitration Association. In addition, the County waives the right to any savings or financial benefit that may be derived from the City's privatization of the sewage treatment system during the term of this Agreement.

3. Annual Base Fee.

The County shall pay to the City an annual base fee, in accordance with Article III, Paragraph 1, as follows:

(a) For Fiscal Year 1998, the sum of Thirteen Million One Hundred Thousand Dollars (\$13,100,000.00) retroactive to July 1, 1997;

(b) For Fiscal Year 1999, the sum of Thirteen Million Four Hundred Sixty Thousand Two Hundred Fifty Dollars (\$13,460,250.00);

(c) For Fiscal Year 2000, the sum of Thirteen Million Eight Hundred Thirty Thousand Four Hundred Six Dollars and Eighty-Seven Cents (\$13,830,406.87).

- 4. SRF Charges.

In addition to the annual base fee, the County shall pay to the City the approximate amount of Four Hundred Thousand Dollars (\$400,000.00) per year, subject to verification, for State of Delaware Revolving Fund ("SRF") principal and interest charges attributable to one aeration basin/settling tank (formerly known as a "Class III" cost), in accordance with Article III, Paragraph 1. SRF charges for FY 1998 shall be retroactive to July 1, 1997. Unless wholly forgiven or assumed, the County's obligation to pay SRF principal and interest charges shall survive this Agreement and shall continue until the State of Delaware has

been paid in full. If partially forgiven or assumed, the County's obligation to pay any remaining SRF principal and interest charges shall survive this Agreement and shall continue until the State of Delaware has been paid in full.

ARTICLE III

BILLING AND PAYMENT

1. Beginning upon execution hereof and continuing during the time of this Agreement, the City shall invoice the County monthly for the payment of all annual base fee charges specified in Article II, such charges to be paid in equal monthly installments in advance, payable on the first (1st) day of each month, or next regular business day when the first falls on a weekend or County holiday. All SRF charges specified in Article II shall be invoiced thirty (30) days in advance by the City and paid by the County to the City no later than one business day prior to the date on which the City is required to make remittance to the State of Delaware.

2. In the event the County fails to pay on the due date the sums due and owing to the City for any month during the term of this Agreement, the County shall pay to the City interest on such unpaid sums at the published six-month Treasury Bill rate on the date such payment was due. In addition, the County shall reimburse

the City for any actual costs, penalties and/or interest imposed on the City as a result of untimely payment of SRF charges by the County.

3. In the event County usage of the City system materially diminishes below its usage for FY 1997 for any reason whatsoever, including such diminution as may result from the establishment by the County of its own sewage treatment plant and/or processes, the County will nonetheless continue to pay to the City the County's share of costs of all present outstanding sewage system obligations (as described in Exhibit C) of the City for the full term thereof, notwithstanding termination of this Agreement by expiration or otherwise. The County's share of costs for the purpose of this calculation shall be equal to the County's actual usage based upon flows, strengths, and loadings in Fiscal Year 1997.

In the event that a diminution as contemplated in this Agreement may result, the City shall make a good faith effort to minimize any expenses or obligations or reasonably foreseeable losses which it may incur. Further provided that in the event such diminution as is contemplated in this Agreement may result from the establishment by the County of its own sewage treatment plant and/or processes, the County will give to the City written notice of such contemplated project not less than one year before the

County incurs any financial obligation toward construction of its own sewage treatment plant and/or processes. The terms of this section shall survive this Agreement and remain in force while any sewage system obligations described in Exhibit C remain outstanding.

4. The parties agree to exchange, upon request, all information that would be available under the State of Delaware Freedom of Information Act (FOIA) regarding the City and County's respective sewer services including, but not limited to, collection, transmission, and treatment. Unless the parties agree otherwise, disputes regarding this paragraph shall not be subject to arbitration pursuant to Article V, Paragraphs 2 and 4 of this Agreement but shall be resolved in accordance with State law in a court of competent jurisdiction.

ARTICLE IV

PLANT EXPANSION

1. The parties acknowledge that the Plant has a limited capacity which may, from time to time, need expansion. Since some or all of any such expansion may be necessitated by County need for additional capacity, the parties agree to cooperate to ensure such expansions are necessary and appropriate, well designed and efficiently achieved.

2. The parties agree to notify each other if they project a need for additional Plant capacity. At such time, the City will initiate a study to determine the feasibility of an expansion to meet projected capacity requirements. The cost of such study shall be paid for by the party (or parties on a pro rata basis) which causes the projected need for additional capacity. Should such study indicate that expansion is not feasible, the capacity of the Plant and the hydraulic allocation of the Plant's capacity shall remain the same. Should such study indicate that further expansion is feasible, the parties shall determine the additional capacity each will require. Upon such determination, the City shall take all necessary action to provide the additional capacity subject to the conditions set forth in the Agreement and the physical capacity of the Plant. The cost of the design and construction of any Plant expansion shall be paid for in proportion to the additional capacity allocated to each party. The appropriate timing of such design and construction shall be determined by the City in consultation with the County.

3. The City shall keep the County informed of the progress of the design and construction of any Plant expansion which will be paid for by the County. The City shall provide upon request any reasonable information or documentation relating to the

design or any revisions thereto, the supervision of construction or the approval of construction payments.

ARTICLE V

GENERAL PROVISIONS

1. Effective Date. This Agreement shall become effective retroactive to July 1, 1997, upon execution by the parties hereto and shall remain in effect until June 30, 2000, unless sooner suspended or terminated in accordance with the terms of this Agreement.

2. Negotiations for a New Agreement. The parties agree to meet with each other no later than November 1, 1999, to begin to negotiate the terms of a new agreement to commence on July 1, 2000. In the event that the parties have not entered into a new agreement by February 1, 2000, the parties agree to arbitrate the terms of a new agreement in accordance with the provisions of Article V, Paragraph 4 herein. Either party may file the necessary demand for arbitration. The parties further agree to attempt to resolve this matter through mediation in accordance with the rules of the American Arbitration Association prior to the commencement of any arbitration hearing.

3. Modification. This Agreement contains the full and complete understanding between the City and County, and supersedes

any and all previous agreements and/or proposals, whether oral or written. With the exception of modification in the manner set forth elsewhere in this Agreement, the Agreement may not be modified except by a written and duly executed amendatory agreement of the parties hereto.

4. Arbitration. Except as provided in Article III, Paragraph 4, all claims, disputes and other matters in question between the parties, arising out of, or relating to this Agreement, or the breach thereof, shall be decided by arbitration in accordance with the rules of the American Arbitration Association then obtaining, unless the parties mutually agree otherwise. No arbitration, arising out of, or relating to this Agreement, shall include, by consolidation, joinder, or in any other manner, any additional party not a party to this Agreement, except by written consent containing a specified reference to this Agreement and signed by the parties hereto. Any consent to arbitration involving an additional party or parties shall not constitute consent to arbitration of any dispute not described therein or with any party not named or described therein. This Agreement to arbitrate and any agreement to arbitrate with an additional party or parties duly consented to by the parties hereto shall be specifically enforceable under the prevailing arbitration law. The demand for arbitration shall be filed in writing with the other party to this

Agreement and with the American Arbitration Association. The demand shall be made within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall the demand for arbitration be made after the date when the institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable Statute of Limitations. The award rendered by the arbitrators shall be final, and judgement may be entered upon it in accordance with the applicable law in any court having jurisdiction thereof. Arbitration costs shall be split equally.

5. Cooperation. The parties agree to cooperate in all matters pertinent to this Agreement to the fullest extent possible. The County agrees to advise the City regularly as to the status of new or proposed certificates of occupancy, sewer permits, and any and all other data and information having an impact upon the volume, character and treatment of sewage so that the City will be kept current as to such information in order to make proper and appropriate plans and/or adjustments in its system for the greater benefit of the City and the County.

6. Notice. Any notice, demand, request, consent, approval or communication required by this Agreement shall be in writing, addressed to the other party at the addresses set forth below:

(a) If to the City, to:

City Solicitor
City of Wilmington Law Department
800 N. French Street
9th Floor
Wilmington, Delaware 19801

(b) If to the County, to:

County Attorney
New Castle County Department of Law
800 N. French Street
8th Floor
Wilmington, Delaware 19801

IN WITNESS WHEREOF, the parties hereto have duly executed
this Agreement on the day and year aforesaid.

CITY OF WILMINGTON

By: James H. Kelly

Mayor

Attest: Leo S. Marshall

City Clerk

Approved as to form

Mark J. Smith
Assistant City Solicitor

NEW CASTLE COUNTY

By: T. P. Gordon

Attest: Marie J. Eskridge

Approved as to form

Wm. J. Smith